

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE**

In re the Application of:	)	
	)	
Sears Brands, LLC	)	
	)	
Serial No. : 76/399,091	)	
	)	Law Office 113
Filed : April 23, 2002	)	Julie A. Watson, Esq.
	)	
Mark : ELITE	)	
	)	
Classes : 011	)	

**REQUEST FOR RECONSIDERATION**

In response to the office action mailed on October 28, 2003, in the above application, Applicant hereby submits additional evidence and arguments against the Section 2(d) refusal in connection with Registration Nos. 2,371,072 and 2,663,985. In light of these additions to the record, Applicant respectfully requests that the Examining Attorney reconsider and withdraw the final refusal.

**Remarks**

**I. NO LIKELIHOOD OF CONFUSION EXISTS WITH RESPECT TO REGISTRATION NO. 2,663,985.**

In her October 28, 2003 final office action, the Examining Attorney deemed the consent agreement between Applicant and the owner of Registration No. 2,663,985 Lennox Industries, Inc. ("Lennox"), as previously submitted, to be insufficient because it constituted an unacceptable "naked" consent. In light of the Examiner's decision, Lennox has reaffirmed its consent to register the instant application, as demonstrated by a new Consent To Trademark Registration Agreement, signed by Carl E. Edwards, Jr.,

an authorized representative of Lennox. A copy of this Consent To Trademark Registration Agreement is attached under Tab 1.

As this Consent To Trademark Registration Agreement highlights, on October 27, 2003, Lennox filed an Amendment to Registration No. 2,663,985 to clarify that the stoves referenced in the goods recitation are "used primarily for room heating and not for cooking," in contrast to Applicant's grills. By clarifying the different nature and purpose of Applicant's and Lennox's goods, the parties have detailed an important reason why there is no likelihood of confusion between the parties' two marks.

The Consent To Trademark Registration Agreement between Applicant and Lennox also makes clear that the parties have bargained in good faith and have determined that Applicant's use and registration of the instant application will not result in a likelihood of confusion with Registration 2,663,985 under Trademark Act Section 2(d), 15 U.S.C. § 1052(d). In addition, the Consent To Trademark Registration Agreement reflects the acknowledgment of both Applicant and Lennox that there has been no known confusion among customers or the public arising from the two parties' concurrent and respective uses of the marks identified by the instant application, Serial No. 76/399,072, and Lennox's Registration No. 2,663,985. Similarly, the Consent To Trademark Registration Agreement memorializes Applicant's and Lennox's agreement to cooperate and take reasonable steps to eliminate any likelihood of confusion in the event any were to arise.

In short, Applicant respectfully submits that the attached Consent To Trademark Registration Agreement between Lennox and Applicant is sufficient to overcome the Examiner's Section 2(d) refusal in connection with Registration No. 2,663,985.

**II. NO LIKELIHOOD OF CONFUSION EXISTS WITH RESPECT TO REGISTRATION NO. 2,371,072.**

The owner of Registration No. 2,371,072, Cosmopolitan International Co., Inc. ("Cosmopolitan"), has granted Applicant consent to register the instant application. A copy of the Consent To Trademark Registration Agreement, signed by Georget C. Li, an authorized representative of Cosmopolitan, is attached under Tab 2.

As this Consent To Trademark Registration Agreement makes clear, Applicant and Cosmopolitan, as the owner of Registration No. 2,371,072, have bargained in good faith and have determined that Applicant's use and registration of the instant application will not result in a likelihood of confusion under Trademark Act Section 2(d), 15 U.S.C. § 1052(d). In addition, the Consent To Trademark Registration Agreement reflects the acknowledgment of both Applicant and Cosmopolitan that there has been no known confusion among customers or the public arising from the two parties' concurrent and respective uses of the marks identified by the instant application, Serial No. 76/399,072, and Registration No. 2,371,072. Similarly, the Consent To Trademark Registration Agreement memorializes Applicant's and Cosmopolitan's agreement to cooperate and take reasonable steps to eliminate any likelihood of confusion in the event any were to arise.

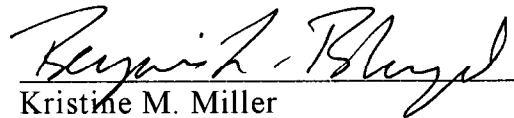
In short, Applicant respectfully submits that the attached Consent To Trademark Registration Agreement between Cosmopolitan and Applicant is sufficient to overcome the Examiner's Section 2(d) refusal in connection with Registration Nos. 2,371,072.

**CONCLUSION**

The detailed consent agreements with the owners of Registration Nos. 2,371,072 and 2,663,985, submitted with this request for reconsideration, are sufficient additional evidence which demonstrate that registration of Applicant's mark will not result in a likelihood of confusion with Registration Nos. 2,371,072 or 2,663,985. Therefore, Applicant respectfully requests that its application be moved to publication. An early and favorable response is requested.

Dated: March 3, 2004

Respectfully submitted,



Kristine M. Miller  
Benjamin L. Blaugrund  
HOLLAND & HART LLP  
P.O. Box 8749  
555 17th Street, Suite 3200  
Denver, CO 80201  
(303) 473-2733

BOX: RESPONSE/NO FEE  
Atty. Docket No.: 50051.0001  
Express Mail No. EV332202991US

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**CERTIFICATE OF MAILING BY EXPRESS MAIL**

Assistant Commissioner for Trademarks  
2900 Crystal Drive  
Arlington, VA 22202-3513

Dear Sir or Madam:

The undersigned hereby certifies that the attached Request For Reconsideration and Tabs A-B relating to the above application, were deposited as "Express Mail," Mailing Label No. EV332202991US, with the United States Postal Service, addressed to Assistant Commissioner for Trademarks, 2900 Crystal Drive, Arlington, VA 22202-3513, on March 3, 2004.

March 3, 2004  
Date

March 3, 2004  
Date

Brenda H. Quintana  
Mailer

Benjamin L. Blaugrund  
Kristine M. Miller  
Benjamin L. Blaugrund  
HOLLAND & HART LLP  
P.O. Box 8749  
555 17th Street, Suite 3200  
Denver, CO 80201  
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## CONSENT TO TRADEMARK REGISTRATION AGREEMENT

This Consent to Trademark Registration Agreement ("Agreement") is made by and between Lennox Industries Inc., having an address at 2100 Lake Park Boulevard, Richardson, Texas 75080 ("Lennox"); and Sears Brands, LLC, having an address at 3333 Beverly Road, Hoffman Estate, Illinois 60179 ("Sears Brands"), and is to be effective for all purposes as of August 4, 2003.

### RECITALS

A. Lennox owns a U.S. trademark registration for ELITE for "Fireplaces, gas and electric stoves, and fireplace inserts in the nature of gas burners and artificial logs," Reg. No. 2,663,985 ("Lennox Registration").

B. Lennox filed an Amendment to the Lennox Registration on October 27, 2003, seeking to amend the Lennox Registration's goods recitation to (additions in bold) "Fireplaces, gas and electric stoves **used primarily for room heating and not for cooking**, and fireplace inserts in the nature of gas burners and artificial logs."

C. Sears Brands is seeking to register a U.S. trademark application for ELITE for "barbeque grills," Ser. No. 76/399,091 ("Sears Brands Application").

D. The U.S. Patent and Trademark Office ("USPTO") has refused to register the Sears Brands Application under Section 2(d) of the Trademark Act, citing the Lennox Registration.

E. The function and purpose of Lennox's stoves are for heating ambient indoor temperatures for the comfort of occupants, and not for cooking.

F. The function and purpose of Sears Brands Application's goods are for cooking.

G. Consequently, the respective goods of the Lennox Registration and the Sears Brands Application have different functions and serve distinct purposes.

### AGREEMENT

NOW, THEREFORE, in consideration of the foregoing recitals, which are incorporated into this Agreement by this reference, and for other full and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties agree as follows:

#### I. No Likelihood of Confusion.

I.1 No Evidence of Actual Confusion. The parties acknowledge that there has been no known confusion among customers or the public arising from the concurrent uses described above.

1.2 Likelihood of Confusion. So long as the parties' respective uses of "ELITE" conform to the terms of this Agreement, there is no likelihood of confusion by prospective purchasers. In the event that, notwithstanding the foregoing, actual confusion develops in the marketplace, the parties will take all reasonable steps necessary to eliminate such confusion, including disclaiming any association with the other party.

2. Consent to Use and Registration.

2.1 By Lennox. Lennox hereby consents to and shall not in the future complain of, oppose, seek to cancel, or otherwise object to Sears Brands's use, licensing or registration of the mark "ELITE" in connection with barbeque grills.

2.2 By Sears Brands. Sears Brands hereby consents to and shall not in the future complain of, oppose, seek to cancel, or otherwise object to Lennox's use, licensing or registration of the mark "ELITE" in connection with fireplaces, gas and electric stoves used primarily for room heating and not for cooking, and fireplace inserts in the nature of gas burners and artificial logs.

3. No Infringing Conduct. The parties, and each of their agents, servants, partners, co-venturers, officers, employees and all of those acting under their control, on their behalf, or in concert and/or participation with them, agree to refrain from:

3.1 Infringing the rights of the other party in and to its respective mark;

3.2 Making, in any manner whatsoever, any statement or representation, or performing any act or using any name, mark, symbol or the like, which: (i) leads the public to believe that one party, or its business, services or products, is in any manner, directly or indirectly, associated or connected with, or authorized, franchised or approved by, the other, party; or (ii) causes confusion, mistake or deception as to the source or sponsorship of any of the other party's businesses, products and/or services; and

3.3 Taking any action in this connection which constitutes unfair competition, trademark or trade dress infringement, dilution, false or misleading or deceptive advertising.

4. Miscellaneous.

4.1 Relationship. This Agreement does not make either party the partner, employee, agent or legal representative of the other party for any purpose whatsoever. Neither party is granted any right or authority to assume or to create any obligation or responsibility, express or implied, on behalf of or in the name of the other party.

4.2 Waiver, Amendment, Modification. This Agreement constitutes the entire Agreement between the parties pertaining to the subject matter contained herein and supersedes all prior and contemporaneous agreements, representations and



understandings of the parties. No waiver, amendment or modification, including those by custom, usage of trade, or course of dealing, of any section of this Agreement will be effective unless in writing and signed by the party against whom such waiver, amendment or modification is sought to be enforced. No waiver by any party of any default in performance by the other party, or of any breach or series of breaches by the other party, shall constitute a waiver of any subsequent default in performance or breach. If any provision of this Agreement is determined to be invalid under any applicable statute or rule of law, it is to that extent to be deemed omitted, and the balance of the Agreement shall remain enforceable.

4.3 Settlement of Disputes. Each party acknowledges and agrees that, if there is any breach of this Agreement, the non-breaching party will suffer irreparable injury that cannot be compensated by money damages and therefore will not have an adequate remedy at law. Either party may seek injunctive relief, without the posting of a bond. If either party is required to take legal action to enforce this Agreement, the prevailing party will be entitled to recover its reasonable attorneys' fees and costs from the other party, which result as a consequence of the legal action. In any action to enforce or construe the terms of this Agreement, the parties waive the right to a trial by jury.

4.4 Cumulative Rights. Any specific right or remedy provided in this Agreement shall not be exclusive but shall be cumulative upon all other rights and remedies allowed under applicable law.

4.5 Governing Law. This Agreement shall be governed by the laws of the State of Colorado without regard to any states' conflict of law provisions that would place jurisdiction in another state.

4.6 Counterparts. This Agreement may be executed in multiple counterparts and by facsimile signature, any one of which will be deemed an original, but all of which shall constitute one and the same instrument.

4.7 Assignment of Marks. The parties specifically agree that if each or either of them assigns any rights in their respective "ELITE" mark, the assignment shall provide that the assignee is specifically bound by the terms of this Agreement.

4.8 Territory. The Territory of this Agreement shall include the entire United States of America and any other territory where the respective services are currently sold or distributed, or may be sold or distributed in the future, including foreign countries

4.9 Headings. Captions and section headings used in this Agreement are for convenience only and are not a part of this Agreement and shall not be used in construing it.

We have carefully reviewed this contract and agree to and accept its terms and conditions.

LENNOX INDUSTRIES INC.

By: Carl E. Edwards, Jr.  
Printed Name: Carl E. Edwards, Jr.  
Title: Secretary  
Date: December 14, 2003

SEARS BRANDS, LLC

By: Lynn H Boone  
Printed Name: Lynn H. Boone  
Title: Vice President  
Date: 12/19/03

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FEB 02 2004

**CONSENT TO TRADEMARK REGISTRATION AGREEMENT**

ATTN: CAL  
FILE

This Consent to Trademark Registration Agreement ("Agreement") is made by and between Cosmopolitan International Co., Inc., having an address at 901 Adele Street, Martinsville, Virginia 24112 ("Cosmopolitan"); and Sears Brands, LLC, having an address at 3333 Beverly Road, Hoffman Estate, Illinois 60179 ("Sears Brands"), and is to be effective for all purposes as of September 15, 2003 ("Effective Date").

**RECITALS**

A. Cosmopolitan owns a U.S. trademark registration for the mark CHEF ELITE for "small electrical appliances, namely roaster ovens, slow cookers, crockery cookers, and indoor electric grills," Reg. No. 2,371,072 ("Cosmopolitan Registration").

B. Sears Brands is seeking to register a U.S. trademark application for ELITE for "barbeque grills," Ser. No. 76/399,091 ("Sears Brands Application").

C. The U.S. Patent and Trademark Office ("USPTO") has refused to register the Sears Brands Application under Section 2(d) of the Trademark Act, citing the Cosmopolitan Registration.

D. The parties have bargained in good faith and have determined that Sears Brands's use and registration of Sears Brands Application will not result in a likelihood of confusion under Section 2(d) of the Trademark Act.

E. Consequently, Cosmopolitan hereby consents to the USPTO registering the Sears Brands Application, under certain terms and conditions as set forth below.

**AGREEMENT**

NOW, THEREFORE, in consideration of the foregoing recitals, which are incorporated into this Agreement by this reference, and for other full and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties agree as follows:

1. Consent

1.1 Cosmopolitan consents to Sears Brands's registration of the Sears Brands Application, and shall not oppose the Sears Brands Application or petition to cancel any resulting registration so long as Sears Brands does not cease use of the mark identified therein for the goods identified therein for any continuous period of three (3) years commencing on or after the effective date of this Agreement.

1.2 Sears Brands shall not petition to cancel the Cosmopolitan Registration so long as Cosmopolitan does not cease use of the mark identified therein for the goods identified therein for any continuous period of three (3) years commencing on or after the Effective Date of this Agreement.

1.3 The parties shall cooperate with each other by executing additional consents, which the other party, the USPTO, or another government agency may determine necessary, to maintain the Sears Brands Application, any registration that issues therefor, or to otherwise carry out the intent of this Agreement.

1.4 Sears Brands agrees to explore in good faith the possibility of having Cosmopolitan supply barbeque grills to Sears Brands by providing Sears, Roebuck and Co.'s buyer(s) of barbeque grills with a letter and accompanying paperwork provided by Cosmopolitan immediately upon execution of this Agreement.

2. No Likelihood of Confusion.

2.1 The parties acknowledge that there has been no known confusion among customers or the public arising from the concurrent uses described above.

2.2 The parties shall not make, in any manner whatsoever, any statement or representation, or perform any act or use any name, mark, symbol or the like, which: (i) leads the public to believe that one party, or its business, services or products, is in any manner, directly or indirectly, associated or connected with, or authorized, franchised or approved by, the other party; or (ii) causes confusion, mistake or deception as to the source or sponsorship of any of the other party's businesses, products and/or services.

2.3 In the event that, notwithstanding the foregoing, a likelihood of confusion arises in the marketplace, as determined in either parties' reasonable discretion, the parties will cooperate and take reasonable steps necessary to eliminate such confusion.

3. Miscellaneous.

3.1 Relationship. This Agreement does not make either party the partner, employee, agent or legal representative of the other party for any purpose whatsoever. Neither party is granted any right or authority to assume or to create any obligation or responsibility, express or implied, on behalf of or in the name of the other party.

3.2 Waiver, Amendment, Modification. This Agreement constitutes the entire Agreement between the parties pertaining to the subject matter contained herein and supersedes all prior and contemporaneous agreements, representations and understandings of the parties. No waiver, amendment or modification, including those by custom, usage of trade, or course of dealing, of any provision of this Agreement will be effective unless in writing and signed by the party against whom such waiver, amendment or modification is sought to be enforced. No waiver by any party of any default in performance by the other party, or of any breach or series of breaches by the other party, shall constitute a waiver of any subsequent default in performance or breach. If any provision of this Agreement is determined to be invalid under any applicable statute or rule of law, it is to that extent to be deemed omitted, and the balance of the Agreement shall remain enforceable.

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3.5 Governing Law. This Agreement shall be governed by the laws of the State of New York without regard to any states' conflict of law provisions that would place jurisdiction in another state.

3.6 Counterparts. This Agreement may be executed in multiple counterparts and by facsimile signature, any one of which will be deemed an original, but all of which shall constitute one and the same instrument.

3.7 Headings. Captions and Section headings used in this Agreement are for convenience only and are not a part of this Agreement and shall not be used in construing it.

We have carefully reviewed this contract and agree to and accept its terms and conditions.

COSMOPOLITAN INTERNATIONAL  
CO., INC.

By: [Signature]  
Printed Name: DAVID GEORGET C. LI  
Title: PRESIDENT  
Date: 1-27-04

SEARS BRANDS, LLC

By: [Signature]  
Printed Name: LYNN HUDSON BOONE  
Title: Vice President  
Date: 12/19/03

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**REQUEST FOR RECONSIDERATION**

In response to the office action mailed on October 28, 2003, in the above application, Applicant hereby submits additional evidence and arguments against the Section 2(d) refusal in connection with Registration Nos. 2,371,072 and 2,663,985. In light of these additions to the record, Applicant respectfully requests that the Examining Attorney reconsider and withdraw the final refusal.

**Remarks**

**I. NO LIKELIHOOD OF CONFUSION EXISTS WITH RESPECT TO REGISTRATION NO. 2,663,985.**

In her October 28, 2003 final office action, the Examining Attorney deemed the consent agreement between Applicant and the owner of Registration No. 2,663,985 Lennox Industries, Inc. ("Lennox"), as previously submitted, to be insufficient because it constituted an unacceptable "naked" consent. In light of the Examiner's decision, Lennox has reaffirmed its consent to register the instant application, as demonstrated by a new Consent To Trademark Registration Agreement, signed by Carl E. Edwards, Jr.,

an authorized representative of Lennox. A copy of this Consent To Trademark Registration Agreement is attached under Tab 1.

As this Consent To Trademark Registration Agreement highlights, on October 27, 2003, Lennox filed an Amendment to Registration No. 2,663,985 to clarify that the stoves referenced in the goods recitation are "used primarily for room heating and not for cooking," in contrast to Applicant's grills. By clarifying the different nature and purpose of Applicant's and Lennox's goods, the parties have detailed an important reason why there is no likelihood of confusion between the parties' two marks.

The Consent To Trademark Registration Agreement between Applicant and Lennox also makes clear that the parties have bargained in good faith and have determined that Applicant's use and registration of the instant application will not result in a likelihood of confusion with Registration 2,663,985 under Trademark Act Section 2(d), 15 U.S.C. § 1052(d). In addition, the Consent To Trademark Registration Agreement reflects the acknowledgment of both Applicant and Lennox that there has been no known confusion among customers or the public arising from the two parties' concurrent and respective uses of the marks identified by the instant application, Serial No. 76/399,072, and Lennox's Registration No. 2,663,985. Similarly, the Consent To Trademark Registration Agreement memorializes Applicant's and Lennox's agreement to cooperate and take reasonable steps to eliminate any likelihood of confusion in the event any were to arise.



In short, Applicant respectfully submits that the attached Consent To Trademark Registration Agreement between Lennox and Applicant is sufficient to overcome the Examiner's Section 2(d) refusal in connection with Registration No. 2,663,985.

**II. NO LIKELIHOOD OF CONFUSION EXISTS WITH RESPECT TO REGISTRATION NO. 2,371,072.**

The owner of Registration No. 2,371,072, Cosmopolitan International Co., Inc. ("Cosmopolitan"), has granted Applicant consent to register the instant application. A copy of the Consent To Trademark Registration Agreement, signed by Georget C. Li, an authorized representative of Cosmopolitan, is attached under Tab 2.

As this Consent To Trademark Registration Agreement makes clear, Applicant and Cosmopolitan, as the owner of Registration No. 2,371,072, have bargained in good faith and have determined that Applicant's use and registration of the instant application will not result in a likelihood of confusion under Trademark Act Section 2(d), 15 U.S.C. § 1052(d). In addition, the Consent To Trademark Registration Agreement reflects the acknowledgment of both Applicant and Cosmopolitan that there has been no known confusion among customers or the public arising from the two parties' concurrent and respective uses of the marks identified by the instant application, Serial No. 76/399,072, and Registration No. 2,371,072. Similarly, the Consent To Trademark Registration Agreement memorializes Applicant's and Cosmopolitan's agreement to cooperate and take reasonable steps to eliminate any likelihood of confusion in the event any were to arise.

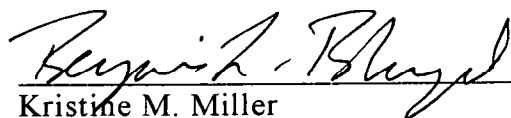
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**CONCLUSION**

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Respectfully submitted,



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4.2 Waiver. Amendment. Modification. This Agreement constitutes the entire Agreement between the parties pertaining to the subject matter contained herein and supersedes all prior and contemporaneous agreements, representations and

understandings of the parties. No waiver, amendment or modification, including those by custom, usage of trade, or course of dealing, of any section of this Agreement will be effective unless in writing and signed by the party against whom such waiver, amendment or modification is sought to be enforced. No waiver by any party of any default in performance by the other party, or of any breach or series of breaches by the other party, shall constitute a waiver of any subsequent default in performance or breach. If any provision of this Agreement is determined to be invalid under any applicable statute or rule of law, it is to that extent to be deemed omitted, and the balance of the Agreement shall remain enforceable.

4.3 Settlement of Disputes. Each party acknowledges and agrees that, if there is any breach of this Agreement, the non-breaching party will suffer irreparable injury that cannot be compensated by money damages and therefore will not have an adequate remedy at law. Either party may seek injunctive relief, without the posting of a bond. If either party is required to take legal action to enforce this Agreement, the prevailing party will be entitled to recover its reasonable attorneys' fees and costs from the other party, which result as a consequence of the legal action. In any action to enforce or construe the terms of this Agreement, the parties waive the right to a trial by jury.

4.4 Cumulative Rights. Any specific right or remedy provided in this Agreement shall not be exclusive but shall be cumulative upon all other rights and remedies allowed under applicable law.

4.5 Governing Law. This Agreement shall be governed by the laws of the State of Colorado without regard to any states' conflict of law provisions that would place jurisdiction in another state.

4.6 Counterparts. This Agreement may be executed in multiple counterparts and by facsimile signature, any one of which will be deemed an original, but all of which shall constitute one and the same instrument.

4.7 Assignment of Marks. The parties specifically agree that if each or either of them assigns any rights in their respective "ELITE" mark, the assignment shall provide that the assignee is specifically bound by the terms of this Agreement.

4.8 Territory. The Territory of this Agreement shall include the entire United States of America and any other territory where the respective services are currently sold or distributed, or may be sold or distributed in the future, including foreign countries

4.9 Headings. Captions and section headings used in this Agreement are for convenience only and are not a part of this Agreement and shall not be used in construing it.

We have carefully reviewed this contract and agree to and accept its terms and conditions.

LENNOX INDUSTRIES INC.

By: Carl E. Edwards, Jr.  
Printed Name: Carl E. Edwards, Jr.  
Title: Secretary  
Date: December 16, 2003

SEARS BRANDS, LLC

By: Lynn H Boone  
Printed Name: Lynn H. Boone  
Title: Vice President  
Date: 12/19/03

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FEB 02 2004

**CONSENT TO TRADEMARK REGISTRATION AGREEMENT**

ATTN: CAL  
FILE

This Consent to Trademark Registration Agreement ("Agreement") is made by and between Cosmopolitan International Co., Inc., having an address at 901 Adele Street, Martinsville, Virginia 24112 ("Cosmopolitan"); and Sears Brands, LLC, having an address at 3333 Beverly Road, Hoffman Estate, Illinois 60179 ("Sears Brands"), and is to be effective for all purposes as of September 15, 2003 ("Effective Date").

**RECITALS**

A. Cosmopolitan owns a U.S. trademark registration for the mark CHEF ELITE for "small electrical appliances, namely roaster ovens, slow cookers, crockery cookers, and indoor electric grills," Reg. No. 2,371,072 ("Cosmopolitan Registration").

B. Sears Brands is seeking to register a U.S. trademark application for ELITE for "barbeque grills," Ser. No. 76/399,091 ("Sears Brands Application").

C. The U.S. Patent and Trademark Office ("USPTO") has refused to register the Sears Brands Application under Section 2(d) of the Trademark Act, citing the Cosmopolitan Registration.

D. The parties have bargained in good faith and have determined that Sears Brands's use and registration of Sears Brands Application will not result in a likelihood of confusion under Section 2(d) of the Trademark Act.

E. Consequently, Cosmopolitan hereby consents to the USPTO registering the Sears Brands Application, under certain terms and conditions as set forth below.

**AGREEMENT**

NOW, THEREFORE, in consideration of the foregoing recitals, which are incorporated into this Agreement by this reference, and for other full and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties agree as follows:

1. **Consent**

1.1 Cosmopolitan consents to Sears Brands's registration of the Sears Brands Application, and shall not oppose the Sears Brands Application or petition to cancel any resulting registration so long as Sears Brands does not cease use of the mark identified therein for the goods identified therein for any continuous period of three (3) years commencing on or after the effective date of this Agreement.

1.2 Sears Brands shall not petition to cancel the Cosmopolitan Registration so long as Cosmopolitan does not cease use of the mark identified therein for the goods identified therein for any continuous period of three (3) years commencing on or after the Effective Date of this Agreement.

1.3 The parties shall cooperate with each other by executing additional consents, which the other party, the USPTO, or another government agency may determine necessary, to maintain the Sears Brands Application, any registration that issues therefor, or to otherwise carry out the intent of this Agreement.

1.4 Sears Brands agrees to explore in good faith the possibility of having Cosmopolitan supply barbeque grills to Sears Brands by providing Sears, Roebuck and Co.'s buyer(s) of barbeque grills with a letter and accompanying paperwork provided by Cosmopolitan immediately upon execution of this Agreement.

2. No Likelihood of Confusion.

2.1 The parties acknowledge that there has been no known confusion among customers or the public arising from the concurrent uses described above.

2.2 The parties shall not make, in any manner whatsoever, any statement or representation, or perform any act or use any name, mark, symbol or the like, which: (i) leads the public to believe that one party, or its business, services or products, is in any manner, directly or indirectly, associated or connected with, or authorized, franchised or approved by, the other party; or (ii) causes confusion, mistake or deception as to the source or sponsorship of any of the other party's businesses, products and/or services.

2.3 In the event that, notwithstanding the foregoing, a likelihood of confusion arises in the marketplace, as determined in either parties' reasonable discretion, the parties will cooperate and take reasonable steps necessary to eliminate such confusion.

3. Miscellaneous.

3.1 Relationship. This Agreement does not make either party the partner, employee, agent or legal representative of the other party for any purpose whatsoever. Neither party is granted any right or authority to assume or to create any obligation or responsibility, express or implied, on behalf of or in the name of the other party.

3.2 Waiver, Amendment, Modification. This Agreement constitutes the entire Agreement between the parties pertaining to the subject matter contained herein and supersedes all prior and contemporaneous agreements, representations and understandings of the parties. No waiver, amendment or modification, including those by custom, usage of trade, or course of dealing, of any provision of this Agreement will be effective unless in writing and signed by the party against whom such waiver, amendment or modification is sought to be enforced. No waiver by any party of any default in performance by the other party, or of any breach or series of breaches by the other party, shall constitute a waiver of any subsequent default in performance or breach. If any provision of this Agreement is determined to be invalid under any applicable statute or rule of law, it is to that extent to be deemed omitted, and the balance of the Agreement shall remain enforceable.

3.3 Settlement of Disputes. Each party acknowledges and agrees that, if there is any breach of this Agreement, the non-breaching party will suffer irreparable injury that cannot be compensated by money damages and therefore will not have an adequate remedy at law. Either party may seek injunctive relief, without the posting of a bond. If either party is required to take legal action to enforce this Agreement, the prevailing party will be entitled to recover its reasonable attorneys' fees and costs from the other party, which result as a consequence of the legal action. In any action to enforce or construe the terms of this Agreement, the parties waive the right to a trial by jury.

3.4 Cumulative Rights. Any specific right or remedy provided in this Agreement shall not be exclusive but shall be cumulative upon all other rights and remedies allowed under applicable law.

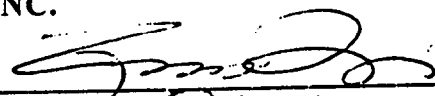
3.5 Governing Law. This Agreement shall be governed by the laws of the State of New York without regard to any states' conflict of law provisions that would place jurisdiction in another state.

3.6 Counterparts. This Agreement may be executed in multiple counterparts and by facsimile signature, any one of which will be deemed an original, but all of which shall constitute one and the same instrument.

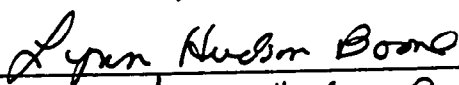
3.7 Headings. Captions and Section headings used in this Agreement are for convenience only and are not a part of this Agreement and shall not be used in construing it.

We have carefully reviewed this contract and agree to and accept its terms and conditions.

COSMOPOLITAN INTERNATIONAL  
CO., INC.

By:   
Printed Name: GEORGE C. LI  
Title: PRESIDENT  
Date: 1-27-04

SEARS BRANDS, LLC

By:   
Printed Name: LYNN HUDSON BOONE  
Title: Vice President  
Date: 12/19/03

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE**

In re the Application of:	)	
	)	
Sears Brands, LLC	)	
	)	
Serial No. : 76/399,091	)	
	)	Law Office 113
Filed : April 23, 2002	)	Julie A. Watson, Esq.
	)	
Mark : ELITE	)	
	)	
Classes : 011	)	

**REQUEST FOR RECONSIDERATION**

In response to the office action mailed on October 28, 2003, in the above application, Applicant hereby submits additional evidence and arguments against the Section 2(d) refusal in connection with Registration Nos. 2,371,072 and 2,663,985. In light of these additions to the record, Applicant respectfully requests that the Examining Attorney reconsider and withdraw the final refusal.

**Remarks**

**I. NO LIKELIHOOD OF CONFUSION EXISTS WITH RESPECT TO REGISTRATION NO. 2,663,985.**

In her October 28, 2003 final office action, the Examining Attorney deemed the consent agreement between Applicant and the owner of Registration No. 2,663,985 Lennox Industries, Inc. ("Lennox"), as previously submitted, to be insufficient because it constituted an unacceptable "naked" consent. In light of the Examiner's decision, Lennox has reaffirmed its consent to register the instant application, as demonstrated by a new Consent To Trademark Registration Agreement, signed by Carl E. Edwards, Jr.,

an authorized representative of Lennox. A copy of this Consent To Trademark Registration Agreement is attached under Tab 1.

As this Consent To Trademark Registration Agreement highlights, on October 27, 2003, Lennox filed an Amendment to Registration No. 2,663,985 to clarify that the stoves referenced in the goods recitation are "used primarily for room heating and not for cooking," in contrast to Applicant's grills. By clarifying the different nature and purpose of Applicant's and Lennox's goods, the parties have detailed an important reason why there is no likelihood of confusion between the parties' two marks.

The Consent To Trademark Registration Agreement between Applicant and Lennox also makes clear that the parties have bargained in good faith and have determined that Applicant's use and registration of the instant application will not result in a likelihood of confusion with Registration 2,663,985 under Trademark Act Section 2(d), 15 U.S.C. § 1052(d). In addition, the Consent To Trademark Registration Agreement reflects the acknowledgment of both Applicant and Lennox that there has been no known confusion among customers or the public arising from the two parties' concurrent and respective uses of the marks identified by the instant application, Serial No. 76/399,072, and Lennox's Registration No. 2,663,985. Similarly, the Consent To Trademark Registration Agreement memorializes Applicant's and Lennox's agreement to cooperate and take reasonable steps to eliminate any likelihood of confusion in the event any were to arise.

In short, Applicant respectfully submits that the attached Consent To Trademark Registration Agreement between Lennox and Applicant is sufficient to overcome the Examiner's Section 2(d) refusal in connection with Registration No. 2,663,985.

**II. NO LIKELIHOOD OF CONFUSION EXISTS WITH RESPECT TO REGISTRATION NO. 2,371,072.**

The owner of Registration No. 2,371,072, Cosmopolitan International Co., Inc. ("Cosmopolitan"), has granted Applicant consent to register the instant application. A copy of the Consent To Trademark Registration Agreement, signed by Georget C. Li, an authorized representative of Cosmopolitan, is attached under Tab 2.

As this Consent To Trademark Registration Agreement makes clear, Applicant and Cosmopolitan, as the owner of Registration No. 2,371,072, have bargained in good faith and have determined that Applicant's use and registration of the instant application will not result in a likelihood of confusion under Trademark Act Section 2(d), 15 U.S.C. § 1052(d). In addition, the Consent To Trademark Registration Agreement reflects the acknowledgment of both Applicant and Cosmopolitan that there has been no known confusion among customers or the public arising from the two parties' concurrent and respective uses of the marks identified by the instant application, Serial No. 76/399,072, and Registration No. 2,371,072. Similarly, the Consent To Trademark Registration Agreement memorializes Applicant's and Cosmopolitan's agreement to cooperate and take reasonable steps to eliminate any likelihood of confusion in the event any were to arise.

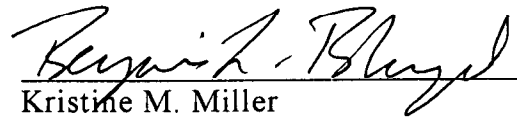
In short, Applicant respectfully submits that the attached Consent To Trademark Registration Agreement between Cosmopolitan and Applicant is sufficient to overcome the Examiner's Section 2(d) refusal in connection with Registration Nos. 2,371,072.

**CONCLUSION**

The detailed consent agreements with the owners of Registration Nos. 2,371,072 and 2,663,985, submitted with this request for reconsideration, are sufficient additional evidence which demonstrate that registration of Applicant's mark will not result in a likelihood of confusion with Registration Nos. 2,371,072 or 2,663,985. Therefore, Applicant respectfully requests that its application be moved to publication. An early and favorable response is requested.

Dated: March 3, 2004

Respectfully submitted,



Kristine M. Miller  
Benjamin L. Blaugrund  
HOLLAND & HART LLP  
P.O. Box 8749  
555 17th Street, Suite 3200  
Denver, CO 80201  
(303) 473-2733



**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE**

In re the Application of:	)	
	)	
Sears Brands, LLC	)	
	)	
Serial No. : 76/399,091	)	
	)	
Filed : April 23, 2002	)	Law Office 113
	)	Julie A. Watson, Esq.
Mark : ELITE	)	
	)	
Classes : 011	)	

**CERTIFICATE OF MAILING BY EXPRESS MAIL**

Assistant Commissioner for Trademarks  
2900 Crystal Drive  
Arlington, VA 22202-3513

Dear Sir or Madam:

The undersigned hereby certifies that the attached Request For Reconsideration and Tabs A-B relating to the above application, were deposited as "Express Mail," Mailing Label No. EV332202991US, with the United States Postal Service, addressed to Assistant Commissioner for Trademarks, 2900 Crystal Drive, Arlington, VA 22202-3513, on March 3, 2004.

March 3, 2004  
Date

March 3, 2004  
Date

Brenda H. Quintana  
Mailer

Benjamin L. Blaugrund  
Kristine M. Miller  
Benjamin L. Blaugrund  
HOLLAND & HART LLP  
P.O. Box 8749  
555 17th Street, Suite 3200  
Denver, CO 80201  
(303) 473-2733



## CONSENT TO TRADEMARK REGISTRATION AGREEMENT

This Consent to Trademark Registration Agreement ("Agreement") is made by and between Lennox Industries Inc., having an address at 2100 Lake Park Boulevard, Richardson, Texas 75080 ("Lennox"); and Sears Brands, LLC, having an address at 3333 Beverly Road, Hoffman Estate, Illinois 60179 ("Sears Brands"), and is to be effective for all purposes as of August 4, 2003.

### RECITALS

A. Lennox owns a U.S. trademark registration for ELITE for "Fireplaces, gas and electric stoves, and fireplace inserts in the nature of gas burners and artificial logs," Reg. No. 2,663,985 ("Lennox Registration").

B. Lennox filed an Amendment to the Lennox Registration on October 27, 2003, seeking to amend the Lennox Registration's goods recitation to (additions in bold) "Fireplaces, gas and electric stoves **used primarily for room heating and not for cooking**, and fireplace inserts in the nature of gas burners and artificial logs."

C. Sears Brands is seeking to register a U.S. trademark application for ELITE for "barbeque grills," Ser. No. 76/399,091 ("Sears Brands Application").

D. The U.S. Patent and Trademark Office ("USPTO") has refused to register the Sears Brands Application under Section 2(d) of the Trademark Act, citing the Lennox Registration.

E. The function and purpose of Lennox's stoves are for heating ambient indoor temperatures for the comfort of occupants, and not for cooking.

F. The function and purpose of Sears Brands Application's goods are for cooking.

G. Consequently, the respective goods of the Lennox Registration and the Sears Brands Application have different functions and serve distinct purposes.

### AGREEMENT

NOW, THEREFORE, in consideration of the foregoing recitals, which are incorporated into this Agreement by this reference, and for other full and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties agree as follows:

#### 1. No Likelihood of Confusion.

1.1 No Evidence of Actual Confusion. The parties acknowledge that there has been no known confusion among customers or the public arising from the concurrent uses described above.

1.2 Likelihood of Confusion. So long as the parties' respective uses of "ELITE" conform to the terms of this Agreement, there is no likelihood of confusion by prospective purchasers. In the event that, notwithstanding the foregoing, actual confusion develops in the marketplace, the parties will take all reasonable steps necessary to eliminate such confusion, including disclaiming any association with the other party.

2. Consent to Use and Registration.

2.1 By Lennox. Lennox hereby consents to and shall not in the future complain of, oppose, seek to cancel, or otherwise object to Sears Brands's use, licensing or registration of the mark "ELITE" in connection with barbeque grills.

2.2 By Sears Brands. Sears Brands hereby consents to and shall not in the future complain of, oppose, seek to cancel, or otherwise object to Lennox's use, licensing or registration of the mark "ELITE" in connection with fireplaces, gas and electric stoves used primarily for room heating and not for cooking, and fireplace inserts in the nature of gas burners and artificial logs.

3. No Infringing Conduct. The parties, and each of their agents, servants, partners, co-venturers, officers, employees and all of those acting under their control, on their behalf, or in concert and/or participation with them, agree to refrain from:

3.1 Infringing the rights of the other party in and to its respective mark;

3.2 Making, in any manner whatsoever, any statement or representation, or performing any act or using any name, mark, symbol or the like, which: (i) leads the public to believe that one party, or its business, services or products, is in any manner, directly or indirectly, associated or connected with, or authorized, franchised or approved by, the other, party; or (ii) causes confusion, mistake or deception as to the source or sponsorship of any of the other party's businesses, products and/or services; and

3.3 Taking any action in this connection which constitutes unfair competition, trademark or trade dress infringement, dilution, false or misleading or deceptive advertising.

4. Miscellaneous.

4.1 Relationship. This Agreement does not make either party the partner, employee, agent or legal representative of the other party for any purpose whatsoever. Neither party is granted any right or authority to assume or to create any obligation or responsibility, express or implied, on behalf of or in the name of the other party.

4.2 Waiver. Amendment. Modification. This Agreement constitutes the entire Agreement between the parties pertaining to the subject matter contained herein and supersedes all prior and contemporaneous agreements, representations and

understandings of the parties. No waiver, amendment or modification, including those by custom, usage of trade, or course of dealing, of any section of this Agreement will be effective unless in writing and signed by the party against whom such waiver, amendment or modification is sought to be enforced. No waiver by any party of any default in performance by the other party, or of any breach or series of breaches by the other party, shall constitute a waiver of any subsequent default in performance or breach. If any provision of this Agreement is determined to be invalid under any applicable statute or rule of law, it is to that extent to be deemed omitted, and the balance of the Agreement shall remain enforceable.

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4.7 Assignment of Marks. The parties specifically agree that if each or either of them assigns any rights in their respective "ELITE" mark, the assignment shall provide that the assignee is specifically bound by the terms of this Agreement.

4.8 Territory. The Territory of this Agreement shall include the entire United States of America and any other territory where the respective services are currently sold or distributed, or may be sold or distributed in the future, including foreign countries

4.9 Headings. Captions and section headings used in this Agreement are for convenience only and are not a part of this Agreement and shall not be used in construing it.

We have carefully reviewed this contract and agree to and accept its terms and conditions.

LENNOX INDUSTRIES INC.

By: Carl E. Edwards, Jr.  
Printed Name: Carl E. Edwards, Jr.  
Title: Secretary  
Date: December 16, 2003

SEARS BRANDS, LLC

By: Lynn H Boone  
Printed Name: Lynn H. Boone  
Title: Vice President  
Date: 12/19/03

3160141\_1.DOC



FEB 02 2004

**CONSENT TO TRADEMARK REGISTRATION AGREEMENT**

ATTN: CAL

FILE

This Consent to Trademark Registration Agreement ("Agreement") is made by and between Cosmopolitan International Co., Inc., having an address at 901 Adele Street, Martinsville, Virginia 24112 ("Cosmopolitan"); and Sears Brands, LLC, having an address at 3333 Beverly Road, Hoffman Estate, Illinois 60179 ("Sears Brands"), and is to be effective for all purposes as of September 15, 2003 ("Effective Date").

**RECITALS**

- A. Cosmopolitan owns a U.S. trademark registration for the mark CHEF ELITE for "small electrical appliances, namely roaster ovens, slow cookers, crockery cookers, and indoor electric grills," Reg. No. 2,371,072 ("Cosmopolitan Registration").
- B. Sears Brands is seeking to register a U.S. trademark application for ELITE for "barbeque grills," Ser. No. 76/399,091 ("Sears Brands Application").
- C. The U.S. Patent and Trademark Office ("USPTO") has refused to register the Sears Brands Application under Section 2(d) of the Trademark Act, citing the Cosmopolitan Registration.
- D. The parties have bargained in good faith and have determined that Sears Brands's use and registration of Sears Brands Application will not result in a likelihood of confusion under Section 2(d) of the Trademark Act.
- E. Consequently, Cosmopolitan hereby consents to the USPTO registering the Sears Brands Application, under certain terms and conditions as set forth below.

**AGREEMENT**

NOW, THEREFORE, in consideration of the foregoing recitals, which are incorporated into this Agreement by this reference, and for other full and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties agree as follows:

1. **Consent**

1.1 Cosmopolitan consents to Sears Brands's registration of the Sears Brands Application, and shall not oppose the Sears Brands Application or petition to cancel any resulting registration so long as Sears Brands does not cease use of the mark identified therein for the goods identified therein for any continuous period of three (3) years commencing on or after the effective date of this Agreement.

1.2 Sears Brands shall not petition to cancel the Cosmopolitan Registration so long as Cosmopolitan does not cease use of the mark identified therein for the goods identified therein for any continuous period of three (3) years commencing on or after the Effective Date of this Agreement.



1.3 The parties shall cooperate with each other by executing additional consents, which the other party, the USPTO, or another government agency may determine necessary, to maintain the Sears Brands Application, any registration that issues therefor, or to otherwise carry out the intent of this Agreement.

1.4 Sears Brands agrees to explore in good faith the possibility of having Cosmopolitan supply barbeque grills to Sears Brands by providing Sears, Roebuck and Co.'s buyer(s) of barbeque grills with a letter and accompanying paperwork provided by Cosmopolitan immediately upon execution of this Agreement.

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2.1 The parties acknowledge that there has been no known confusion among customers or the public arising from the concurrent uses described above.

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2.3 In the event that, notwithstanding the foregoing, a likelihood of confusion arises in the marketplace, as determined in either parties' reasonable discretion, the parties will cooperate and take reasonable steps necessary to eliminate such confusion.

## 3. Miscellaneous.

3.1 Relationship. This Agreement does not make either party the partner, employee, agent or legal representative of the other party for any purpose whatsoever. Neither party is granted any right or authority to assume or to create any obligation or responsibility, express or implied, on behalf of or in the name of the other party.

3.2 Waiver, Amendment, Modification. This Agreement constitutes the entire Agreement between the parties pertaining to the subject matter contained herein and supersedes all prior and contemporaneous agreements, representations and understandings of the parties. No waiver, amendment or modification, including those by custom, usage of trade, or course of dealing, of any provision of this Agreement will be effective unless in writing and signed by the party against whom such waiver, amendment or modification is sought to be enforced. No waiver by any party of any default in performance by the other party, or of any breach or series of breaches by the other party, shall constitute a waiver of any subsequent default in performance or breach. If any provision of this Agreement is determined to be invalid under any applicable statute or rule of law, it is to that extent to be deemed omitted, and the balance of the Agreement shall remain enforceable.

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We have carefully reviewed this contract and agree to and accept its terms and conditions.

COSMOPOLITAN INTERNATIONAL  
CO., INC.

By: 

Printed Name: GEORGE C. LI

Title: PRESIDENT

Date: 1-27-04

SEARS BRANDS, LLC

By: 

Printed Name: LYNN HUDSON BOONE

Title: Vice President

Date: 12/19/03